Nos. 78-209 and 78-5204

In the Supreme Court of the United States

OCTOBER TERM, 1978

LARRY FRENCH, PETITIONER

v.

UNITED STATES OF AMERICA

GUY WARREN PAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The original opinion of the court of appeals (78-5204 Pet. App. A) and the opinion of the court of appeals denying the petitions for rehearing (78-5204 Pet. App. B) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1978. Petitions for rehearing were denied on July 6, 1978. The petition for a writ of certiorari in No. 78-209 was filed on August 5, 1978. The petition for a writ of certiorari in No. 78-5204 was filed on August 7, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conduct of government agents in this case constituted entrapment as a matter of law (No. 78-5204).

2. Whether petitioner Payne was denied the effective assistance of counsel by the manner in which bench conferences were conducted (No. 78-5204).

3. Whether the trial court erred in admitting evidence of petitioner Payne's prior conviction for possession of marijuana without requiring the government to produce a certified copy of the record of that conviction (No. 78-5204).

4. Whether petitioners are entitled to relief on the ground that they were prosecuted in violation of the *Petite* policy (both petitions).

5. Whether the indictment should have been dismissed because petitioner French's wife testified before the grand jury (No. 78-209).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner Payne was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 963 (Count 1), importing marijuana, in violation of 21 U.S.C. 952 (Count 2), and conspiring to distribute

marijuana, in violation of 21 U.S.C. 846 (Count 3). He was sentenced to concurrent terms of four years' imprisonment on Counts 1 and 3 and to a consecutive term of four years' imprisonment on Count 2.[1] Payne was also fined $15,000 on Count 1.

After a jury-waived trial in the same court,[2] petitioner French was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 963 (Count 1), and importing marijuana, in violation of 21 U.S.C. 952 (Count 2). He was sentenced to consecutive terms of four years' imprisonment on the two counts. The court of appeals affirmed in both cases (78-5204 Pet. App. A).

The evidence at trial showed that on July 27, 1975, John Walker, an undercover agent and pilot for the Drug Enforcement Administration, and Joseph Haas, an informant and commercial pilot, met with petitioner Payne and co-conspirator George Boehm in Kenner, Louisiana (Tr. 250, 252).[3] During the meeting, petitioner Payne stated that he had money to start an operation to import marijuana for distribution in the United States (Tr. 254-255). Payne asked Walker and Haas to fly to Mexico to pick up 3,800 pounds of marijuana (Tr. 255). However, Walker told Payne that they did not want to get involved in drug operations in Mexico (*ibid.*). Petitioner then offered to pay Walker and Haas $10.00 for each pound of marijuana they delivered to him from Colombia, and the two pilots agreed (Tr. 256).

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[1]The sentence was made consecutive to a prior state sentence.

[2]Petitioners were named as co-defendants in the same indictment. Petitioner French was granted a mistrial, however, during the joint trial. He then waived his right to a jury trial and stipulated to the evidence presented at the prior trial.

[3]George Boehm was convicted in a separate trial, and the conviction was affirmed by the court of appeals. A petition for a writ of certiorari is pending in that case (No. 78-5203).

On September 29, 1975, Walker, Haas, and petitioner Payne flew to Colombia (Tr. 260). Payne carried $42,000 in his boots (Tr. 261-262). After arriving in Colombia, Payne contacted petitioner French, and the four met the following day (Tr. 263-264). Payne gave French the $42,000, and French said that he would "talk to the Colombians and see if it could be arranged" (Tr. 266). The next day French took Walker and Haas to survey a clandestine landing strip (Tr. 281-285). Later French, Walker, and Haas discussed the details of transporting the marijuana (Tr. 291-293). French told Walker that he should fly to Colombia on October 11, 1975, to pick up the marijuana and that 10,000 pounds would be transported (Tr. 292). Walker, Haas, and Payne subsequently returned to the United States (Tr. 293-294).

Walker rented an airplane on October 10, 1975, and flew with Haas to Colombia (Tr. 294-301). Approximately four tons of marijuana were loaded onto the aircraft, which was then flown to Chickasha, Oklahoma (Tr. 301-305). Walker and Haas were met there by petitioners and others, and the marijuana was loaded into two trucks and taken to a farm in Arkansas (Tr. 306-308, 586-587).

ARGUMENT

1. Petitioner Payne contends (78-5204 Pet. 4) that he was entrapped as a matter of law because government agents actively participated in the criminal scheme. But the focus of the entrapment defense is not on governmental conduct, but is "on the intent or predisposition of the defendant to commit the crime." *Hampton* v. *United States,* 425 U.S. 484, 488 (1976) (plurality opinion), quoting *United States* v. *Russell,* 411 U.S. 423, 429 (1974). "It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." *United States* v. *Russell, supra,* 411 U.S. at 436. Petitioner has not suggested that he

lacked the predisposition to commit the offenses proved at trial, and the evidence shows clearly that petitioner was not an "unwary innocent" (*ibid.*, quoting *Sherman* v. *United States,* 356 U.S. 369, 372 (1958)) but was instead predisposed to engage in such unlawful conduct. Accordingly, the court of appeals correctly concluded (No. 78-5204 Pet. App. 12) that petitioner was not entitled to the entrapment defense as a matter of law.[4]

Nor was the conduct of the government agents "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States* v. *Russell, supra,* 411 U.S. at 431-432. The activity of the agents in flying the marijuana from Colombia to Oklahoma supplied only one element in the petitioner's scheme to import and distribute marijuana, and the participation was solicited and directed entirely by petitioners. Petitioner Payne has suggested no basis on which it could be concluded that the agent's conduct was so outrageous as to deprive him of due process of law, and the court of appeals properly rejected this claim (No. 78-5204 Pet. App. 12).

2. Petitioner Payne contends (78-5204 Pet. 4-5) that he was denied effective assistance of counsel because the district court allowed only one attorney at a time to attend bench conferences. Fourteen defense attorneys participated in the trial, which involved several co-defendants. Although the record does not disclose any ruling by the trial judge limiting the number of counsel allowed to approach the

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[4]Petitioner Payne asserts that there is a conflict among various courts on the issue whether proof of substantial police involvement alone may sustain the entrapment defense. Each of the cases upon which petitioner relies, however, was decided prior to *Hampton, supra.*

bench,[5] a number of bench conferences occurred at which only one defense counsel was present (*e.g.*, Tr. 369, 979, 1042-1044, 1634). On other occasions, however, two or more defense counsel conferred at the bench (*e.g.*, Tr. 310-312, 878, 937-938, 1654-1657). When petitioner Payne's counsel wished to approach the bench, he did so (Tr. 2288-2289). The bench conferences routinely involved matters of significance only to those participating (*e.g.*, Tr. 1232, 1484-1485, 1634), and the trial judge allowed other counsel to be present upon request (Tr. 1121-1122). Matters of general importance to all or several defendants were discussed at conferences held out of the presence of the jury and in the presence of all counsel (Tr. 296, 346, 440-446, 481, 495-499, 538-541, 666-682, 1416-1443, 1554-1556, 1841-1845, 2290-2295).

Petitioner Payne points to no instance in which the trial court's procedures for conducting bench conferences adversely affected his representation. The district court's conduct of the trial merely conformed to the necessities of a large trial involving several defendants. Petitioner Payne's attorney was regularly given the opportunity to address the trial judge out of the jury's presence, and there is no basis for any claim that petitioner was denied the effective assistance of counsel.

3. Petitioner Payne urges (78-5204 Pet. 3, 5) that the trial court erred in admitting evidence of petitioner's prior conviction for possession of marijuana without requiring the prosecutor to produce a certified copy of the judgment of conviction. At trial, petitioner Payne asserted an entrapment defense. During cross-examination he conceded that he had been convicted of possessing 165

[5]According to petitioner (78-5204 Pet. 3), a co-defendant moved to have the transcript expanded to include the ruling, but that motion was denied.

pounds of marijuana in 1975 (Tr. 1912). Upon redirect examination, however, Payne testified that he was in fact innocent of the prior offense and that he had pleaded guilty to that charge only because his defense witness was unavailable (Tr. 1913-1914). A narcotics agent testified during the government's rebuttal that he had observed Payne commit the prior offense and that he had been present at the guilty plea proceedings. Contrary to Payne's testimony, the agent stated that Payne's purported defense witness was available to testify if a trial had been held (Tr. 2270-2277).

Petitioner has conceded the fact of the prior conviction. Since there was no dispute at trial that petitioner previously had been convicted, there was no reason to produce a certified record of that conviction. A copy of the judgment would have revealed no relevant information concerning the dispute that arose at trial regarding the facts underlying the conviction. Accordingly, the court properly rejected petitioner's request that the official record of conviction be produced at trial.

4. Petitioners claim (78-5204 Pet. 5-7; 78-209 Pet. 18-19) that they were prosecuted in violation of the *Petite* policy. On October 15, 1975, petitioners were arrested by state law enforcement officers in Arkansas. They were subsequently convicted in state court of possession of marijuana. Thereafter, the present federal indictment was returned, and petitioners were tried and convicted in federal court. The state and federal convictions both arose from the same criminal scheme.

The federal prosecution was not authorized in advance by the Attorney General, or Assistant Attorney General, in accordance with the *Petite* policy, adopted by the Department of Justice to limit successive federal and state prosecutions to cases where there are compelling reasons for

the federal prosecution. See *Rinaldi* v. *United States*, 434 U.S. 22 (1977); *Petite* v. *United States*, 361 U.S. 529 (1960). However, on December 17, 1977, while petitioners' appeals were pending, the federal prosecution was authorized *nunc pro tunc* by Attorney General Bell.

Petitioners first raised the claim that the federal prosecution violated the *Petite* policy in petitions for rehearing before the court of appeals. Petitioners contended that the federal prosecution was barred because it was not authorized in advance in conformity with normal practice under the *Petite* policy. The court of appeals rejected this claim, relying upon its prior en banc decisions in *United States* v. *Thompson*, No. 76-1883 (June 15, 1978), cert. denied, No. 78-5087 (Oct. 10, 1978), and *United States* v. *Fritz*, No. 77-1027 (July 3, 1978), petition for a writ of certiorari pending, No. 78-5192.

The petitioner in *Thompson* was indicted along with the petitioners in this case, and the prosecution of petitioners and Thompson was authorized *nunc pro tunc* at the same time by the Attorney General.[6] We therefore rely upon our memorandum in *Thompson*, in which we submitted that the administration of the *Petite* policy represents an exercise of prosecutorial discretion by the Department of Justice and creates no judicially enforceable rights in defendants, that the *nunc pro tunc* authorization of federal prosecutions complies with the aims of the *Petite* policy, and that, in any event, no prejudice results from such authorizations.[7]

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[6]Thompson pleaded guilty in federal court to conspiracy to distribute marijuana after he had been convicted of possession of marijuana in state court.

[7]We are sending a copy of our memorandum in *Thompson* to petitioners' counsel.

5. Petitioner French contends (78-209 Pet. 11-18) that the indictment must be dismissed because his wife testified before the grand jury in violation of the privilege against adverse spousal testimony.[8] But the indictment is facially valid, and "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. *Costello* v. *United States*, [350 U.S. 359 (1956)]; *Holt* v. *United States*, 218 U.S. 245 (1910) * * *." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974). See *Lawn* v. *United States*, 355 U.S. 339, 349-350 (1958). Petitioner's claim that the grand jury heard incompetent evidence thus provides no basis for dismissal of the indictment.[9]

Petitioner argues that the prosecutor acted in bad faith in calling petitioner's wife before the grand jury and that the indictment should therefore be dismissed. In the government's response to a pretrial motion filed by French, however, the prosecutor advised the district court that (R. 224-225):

> [P]rior to the January Session of the Grand Jury, Assistant United States Attorney Floy Dawson entered into plea bargain discussions with defendant's counsel relative to Barbara French [petitioner's wife]. It was agreed that Barbara French would remain as unindicted co-conspirator, in return for her testimony and co-operation. When asked about the "husband-wife"

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[8]The privilege against adverse spousal testimony is distinct from the privilege against disclosure of confidential marital communications. *United States* v. *Fisher*, 518 F. 2d 836, 838 n.2 (2d Cir.), cert. denied, 423 U.S. 1033 (1975); 8 Wigmore, *Evidence* § 2334 (McNaughton rev. ed. 1961). Petitioner relies only upon the former privilege.

[9]Petitioner French asserts (78-209 Pet. 4) that his wife was the only witness to testify before the grand jury. The prosecutor represented to the district court, however, that in fact numerous other witnesses testified against petitioner French before the grand jury, and that their testimony was ample to support the indictment independent of any testimony by French's wife (R. 335-336).

> privilege problems that could arise from this situation, Assistant United States Attorney Dawson was advised that [petitioner] Larry French was going to plead guilty, and accordingly, there would be no problems in this regard.

After the indictment was returned, petitioner French pleaded not guilty. The negotiations leading to the appearance of Barbara French before the grand jury, however, reveal that the claim of prosecutorial misconduct is unfounded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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